# Texas Department of Banking

*Jerry G. Sanchez*
*Assistant General Counsel*



November 27, 1996

RQ-924

FILE # MC39281-96
I.D. # 39281

Ms. Sarah Shirley
Opinions Division
Office of the Attorney General of the State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RE: Applicability of TEX. REV. CIV. STAT. ANN. art. 350 (Vernon 1997, Supp.), the Currency Exchange Act, to Non-Indian Third Parties Conducting Unlicensed Currency Exchange Activities on Indian Reservations Located in Texas

Dear Ms. Shirley:

On behalf of the Texas Department of Banking ("Department"), I respectfully request a decision from the Office of the Attorney General pursuant to TEX. GOV'T CODE ANN. §402.042 (Vernon 1997) as to whether the Currency Exchange Act is applicable to non-Indian third-parties conducting unlicensed currency exchange transactions on an Indian reservation located in Texas. While this request is factually limited to the Kickapoo Indian reservation located in Eagle Pass, Texas, it is my understanding that the Tigua Indian reservation located in El Paso, Texas, is also managed by a non-Indian management company which may be conducting unlicensed currency exchange transactions.

Enclosed is a copy of an internal legal memorandum dated November 19, 1996, which concludes that case law may support the applicability of the Currency Exchange Act to non-Indian third-parties conducting unlicensed currency exchange transactions on Indian reservations located in Texas. Should you have any questions, or desire further information or briefing, the Department would appreciate the opportunity to respond. You may reach me by telephone at 475-1303. Also, if we receive any additional factual information regarding this matter, I will promptly forward it to your office.

Sincerely,

Jerry G. Sanchez
Assistant General Counsel

JGS\jd
Enclosure

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# Texas Department of Banking

## MEMORANDUM

November 20, 1996

TO: Catherine A. Ghiglieri
Commissioner

FROM: Stephanie Newberg
Director of Special Audits

SUBJECT: Request for an Attorney General's Opinion

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We have reviewed and concur with the attached memorandum from Assistant General Counsel Jerry G. Sanchez concerning currency exchange activity being conducted on an Indian reservation in Texas.

We recommend this matter be referred to the Texas Attorney General for an official opinion whether the activity of non-Indian third-parties conducting currency exchange business on a reservation in Texas should be licensed under the Currency Exchange Act.

Thank you.

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TO: Stephanie Newberg

FROM: Commissioner Ghiglieri

Your request for referral of this matter to the Attorney General for an opinion is

APPROVED/DISAPPROVED.

Catherine A. Ghiglieri

**Texas Department of Banking**

2601 N. Lamar Boulevard, Austin, Texas 78705-4294 ■ (512) 475-1300 ■ Fax (512) 475-1313

# MEMORANDUM

November 19, 1996

**TO:** Nanette Smith, Assistant Director, Special Audits
Bert Gonzalez, Examiner

**FROM:** Jerry G. Sanchez, Assistant General Counsel

**RE:** Applicability of the Currency Exchange Act to Indian Reservations located in Texas

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You have inquired as to whether TEX. REV. CIV. STAT. ANN. art. 350 (Vernon 1996, Supp.), the Currency Exchange Act (the "Act")is applicable to activities conducted by Indians on Indian reservations located in the State of Texas. You have received some information that the Kickapoo Indian reservation in Eagle Pass, Texas, is conducting unlicensed currency exchange transactions at its gambling facility. In particular, the information supplied to your office indicates that the Kickapoo Indians have contracted with a non-Indian Minnesota-based management company to operate their gambling facility. As part of this operation, the Minnesota-based management company is conducting unlicensed currency exchange activities. You are uncertain as to whether the Kickapoo Indians are profiting from these illegal currency exchange transactions. You have informed me that the management company does not have a currency exchange license from the Texas Department of Banking.

I conclude that the Act is likely to be construed as civil/regulatory and not directly applicable to Indians living on reservations located in Texas. However, case law may support the proposition that the Act is applicable to non-Indian third-parties conducting unlicensed currency exchange activities on Indian reservations since the Act is not directed at Indians and does not impose a burden on the Indians. Because the issue of Indian gambling casinos in Texas is a legally-sensitive subject matter, I recommend that we seek a legal opinion on this issue from the Texas Attorney General's Office. A copy of this memorandum would accompany any such request. The following is an analysis of the facts and issues.

## I. Activities of Indians

Under 28 U.S.C. §1360, made applicable to Texas under 25 U.S.C. §1300b-14, a state may fully enforce a criminal law within an Indian reservation; however, a state

may only enforce a civil law within an Indian reservation if it is relevant to private civil litigation in state court. Thus, it must be determined whether the law is criminal in nature, and thus fully applicable to Indian reservations, or civil in nature and applicable only as it may be relevant to private civil litigation in state court. Ysleta Del Sur Pueblo v. State of Texas, 36 F.2d. 1325, cert. den. 115 S.Ct. 1358 (1994); and California v. Cabazon Band of Mission Indians, 480 U.S. 202 (Cal. 1987).

For purpose of application to Indian reservation activity, legislative intent determines whether a state statute is regulatory or prohibitory and state public policy determines whether an activity is prohibited or regulated and whether state control can be exercised over such activity when carried on an Indian reservation. Seminole Tribe of Florida v. Butterworth, 658 F.2d 310, cert. den. 102 S.Ct. 1717, 455 U.S. 1020 (5th Cir. 1981). In Butterworth, the court found that since bingo was permitted in some forms in the state, the bingo statute was a regulatory statute and unenforceable on the reservation. In California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083,(1987), the court held that California's bingo statute was civil/regulatory in nature and did not apply to reservation activities on the Indian reservation. Similarly, Wisconsin's bingo statutes were found to be civil regulatory and, thus, not enforceable by Wisconsin on an Indian reservation. Oneida Tribe of Indians of Wisconsin v. State of Wisconsin, 518 F.Supp. 712 (D.C. Wis. 1981). See also Barona Group of Capitan Grande Band of Mission Indians, San Diego County, 694 F.2d. 1185, cert. den. 103 S.Ct. 2091, 461 U.S. 929 (1982). Also, hunting and fishing license statutes have been found to be civil regulatory and, thus, not enforceable on Indian reservations. See U.S. v. Marcyes, 557 F.2d 1361 (9th Cir. 1977); and, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-332 (1983).

The Act does not outlaw currency exchange activities; however, it does require a license to conduct currency exchange activities in Texas. In Serian v. State of Florida, 588 So.2d 251 (D.C. Fla. 1991), the court held that an optometrist licensing statute is criminal/prohibitory and may be enforced on an Indian reservation because the state's public policy was to protect the public from untrained optometrists and not "... merely to regulate conduct and produce revenue..." While the Serian ruling is still good law, that decision has not been cited by the fifth circuit or any other courts. Texas' public policy for implementation of the Act is to eliminate money laundering which is criminal/prohibitory; however, the primary purpose of the Department's examination of currency exchange businesses is safety and soundness (i.e., civil/regulatory and not criminal/prohibitory). If evidence of money laundering is discovered during an examination, criminal referrals are made. In light of the foregoing cases which apply a criminal/prohibitory and civil/regulatory analysis, it is likely that the Act will be construed as civil/regulatory and not be directly applicable to the activities of Indians

living on reservations.

**II. Activities of Non-Indians**

However, the U.S. Supreme Court has held that a state may validly assert authority over the activities of non-members on an Indian reservation. In Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), the U.S. Supreme Court upheld state imposed severance taxes on the production of oil and gas by non-Indian lessees because it was not directed specifically at the Indians. Also, in Department of Taxation and Finance of New York v. Milhelm Attea & Brothers, Inc., 114 S. Ct. 2028 (1994), the U.S. Supreme Court held that New York's requirements that retailers on Indian reservations obtain state tax exemption certificates, in connection with the sale of cigarettes to Indians, and its requirement that wholesalers selling cigarettes for ultimate resale on Indian reservations limit their sale of untaxed cigarettes to persons who could produce valid exemption certificates, and that wholesalers maintain detailed records on tax-exempt transactions, was not preempted by federal law. The court held that the specific kind of state tax obligation that New York's regulations are designed to enforce--which falls on non-Indian purchasers of goods that are merely retailed on a reservation--stands on markedly different footing from a tax imposed directly on Indian traders, on enrolled tribal members or tribal organizations, or on "value generated on the reservation by activities involving the tribes." Milhem at 2034.

Also, in Moe v. Confederated Salish and Kootenai Tribes, 462 U.S. 324, 331-332 (1983), Washington v. Confederated Tribes of Colville Indian Reservations, 447 U.S. 134 (1980), and Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991), the U.S. Supreme Court held that in the absence of express congressional permission, a state could require tribal smokeshops on Indian reservations to collect state sales tax from their non-Indian customers. Both cases involved nonmembers entering and purchasing tobacco products on the reservation involved. The U.S. Supreme Court held that the state's interest in assuring the collection of sales taxes from non-Indians enjoying the off-reservation services of the state was sufficient to warrant the minimal burden imposed on the tribal smokeshop operators. However, in Langley v. Ryder, 602 F. Supp. 335 (W.D. La. 1985), the court held that Louisiana could not apply its gambling laws to Indians conducting unlicensed bingo games in Indian country even to the limited extent that they allowed non-Indians to participate because the law was directed at the Indian operator, not the non-Indian player.

Based on the aforementioned cases, a strong argument can be made that the non-Indian Minnesota-based management company which operates the gambling casino, including conducting illegal currency exchange activities on the Kickapoo Indian Reservation should be licensed under the Act. The Act's regulation of currency exchange

activities in Texas is not directed at the Indians and no burden is imposed directly on the Kickapoo Indians. Therefore, the non-Indian Minnesota-based management company should be licensed under the Act.

## III. Conclusion

To summarize, the Act is likely to be construed as civil/regulatory and not applicable to Indians living on reservations. However, case law may support the proposition that the Act is applicable to non-Indian third-parties conducting unlicensed currency exchange activities on Indian reservations since the Act is not directed at Indians and does not impose a burden on the Indians.

cc: Stephanie Newberg, Director, Special Audits
Everette Jobe, General Counsel

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